

ROBERT K. SHARP,)
)
 Plaintiff/Appellant,)
)
 VS.)
)
 JOHNNY R. TUNE and TUNE)
 INSURANCE CENTER, INC.,)
)
 Defendants/Appellees.)

Appeal No.
01-A-01-9606-CH-00279

Davidson Chancery
No. 94-99-1(II)

FILED

January 15, 1997

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE ELLEN HOBBS LYLE, CHANCELLOR

F. CLAY BAILEY, JR.
TUNE, ENTREKIN & WHITE
315 Deaderick Street
First American Center, 21st Floor
Nashville, Tennessee 37238
Attorney for Plaintiff/Appellant

THOMAS W. HARDIN
HARDIN & PARKES
102 West Seventh Street
P. O. Box 692
Columbia, Tennessee 38402-0692
Attorney for Defendants/Appellees

AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
LEWIS, J.

OPINION

One of the founders of an insurance agency claimed that his stock in the company is being held in trust by the other founder. The Chancery Court of Davidson County held that the plaintiff failed to prove his case by the high degree of proof required to establish an oral trust. We affirm the chancellor's dismissal of the claim, but on the alternate ground that the plaintiff failed to prove that he satisfied the conditions precedent to the obligation to convey the shares to him.

I.

In 1987, Robert K. Sharp, an agent with Allstate Insurance Company, and Johnny R. Tune, a veteran insurance agent, agreed to start an insurance agency. Sharp agreed to get some of his friends to invest \$40,000 for which they would own forty percent (800 shares) of the company. The remaining 1200 shares in the company were issued to Mr. Tune. Six hundred of the shares were to belong to Mr. Tune absolutely. The conditions under which he held the remaining 600 shares are the subject of this dispute.

Mr. Tune immediately joined the company and brought his book of business with him. Mr. Sharp continued with Allstate, anticipating that he would join the agency at some future date.

Mr. Sharp contends that Mr. Tune held 600 shares in trust, to be delivered to Mr. Sharp when he retired from Allstate. Allegedly, Mr. Sharp's reason for having Mr. Tune hold the shares for him was that he didn't want Allstate to know he had an interest in another company. (Mr. Sharp had, however, held an interest in another agency while employed at Allstate. When the parties established the Tune

Agency they assumed a debt of approximately \$26,000 from Mr. Sharp's former company.) Mr. Tune contends that as a condition precedent to Mr. Sharp's right to receive the shares Mr. Sharp had to refer business to the new agency, join the business on a full time basis when he retired in 1990, and bring with him his book of business generating approximately \$1,000,000 in annual premiums.

The firm prospered under Mr. Tune's control, and Mr. Tune had the company buy out the outside investors for \$65,000. Mr. Tune and his wife personally guaranteed a \$40,000 bank loan to be used in the transaction. In 1988, Mr. Sharp needed to borrow some money, so he asked Mr. Tune to be allowed to use 600 shares of the company stock as collateral for the loan. Mr. Tune agreed on the condition that he retain the voting rights and that the stock be returned to him when the loan was repaid.

Mr. Sharp retired from Allstate in November of 1990. He joined the Tune Agency, repaid the loan, and delivered the stock certificate back to Mr. Tune. He was, however, unable to devote much time to his work because of mounting financial difficulties and his wife's illness. He executed a petition in bankruptcy and fought with the Internal Revenue Service over a tax claim. He did not take any part in the management of the business, but he did share in the revenues on a 45-55¹ basis with Mr. Tune for the years of 1990, 1991 and 1992.

Although Mr. Tune continued to encourage Mr. Sharp to spend more time at the agency, the relationship between the parties cooled late in 1992 when Mr. Tune would not agree to allow the company to loan money to Mr. Sharp or Mr. Sharp's son. In May of 1993 Mr. Sharp left the company after failing to get Mr. Tune's

¹Sometime before he retired, Mr. Sharp agreed that Mr. Tune should own fifty-five percent of the company.

agreement that he (Mr. Sharp) owned forty-five percent of the company. He filed this action claiming a full one-half of the stock.

II.

The chancellor held that Mr. Sharp had failed to carry the high burden of proof required to establish a parol trust. See *Gray v. Todd*, 819 S.W.2d 104 (Tenn. App. 1991). Mr. Sharp argues that the proof does establish the trust and that Mr. Tune, as the trustee, has the burden of proving his version of the conditions under which he held title to the shares. See *Browder v. Hite*, 602 S.W.2d 489 (Tenn. App. 1980).

The legal theories relied on by the parties are correct, but the trouble is that they are fighting on different fronts. The arguments do not meet, probably because they are both focusing on who has the burden of proof rather than what the evidence actually establishes.

The proof is clear that in the beginning Mr. Sharp was to have an equal ownership interest in the Tune Agency when certain conditions were met. Therefore, Mr. Tune was holding 600 shares of the agency stock subject to a contractual obligation to transfer them to Mr. Sharp when he satisfied the conditions. Mr. Sharp says he had satisfied all the conditions. Mr. Tune says Mr. Sharp failed to fulfill the two most important conditions: to come to work full time when he retired from Allstate and to bring a \$1,000,000 book of business with him.

The truth of the matter depends mainly on the credibility of the two parties. The circumstantial evidence is about evenly balanced. On one hand Mr. Sharp points to the fact that he shared in the profits once he retired from Allstate; that he used his shares as collateral for a loan in 1988; that in December of 1988 Mr. Tune

asked an attorney to prepare documents reflecting the parties' agreement and did not mention the conditions he now insists on; and that the first time Mr. Tune mentioned the additional conditions was in 1993 when the parties were in open dispute about the shares.

On the other hand, Mr. Sharp did not demand the stock when he retired from Allstate nor did he ask that the stock be issued to him when he paid off the loan, even though he had retired by that time. In documents executed in 1989 and 1991 he took inconsistent positions with respect to his ownership of stock in the agency. In financial statements filed with two different banks in 1989, he claimed he owned 1,000 shares in the corporation and that they were worth \$300,000. In 1991 he executed a petition to be filed in the bankruptcy court but he did not list the stock as an asset. In 1993 he denied owning any shares in a corporation when he had to file a financial statement with the Internal Revenue Service.

With respect to the parties' credibility the chancellor made only one specific finding. She found that Mr. Tune's testimony was credible when he testified that he did not sign the papers prepared by the attorney because "the papers did not reflect his understanding of the parties' positions."

The chancellor did, however, make implicit findings with respect to Mr. Sharp's credibility. First, she found as a fact that,

The bankruptcy papers contained a number of inaccuracies, such as the plaintiff stated in the bankruptcy paper that no one else was holding property for him and that no one was holding anything of value for him. The plaintiff also stated in the papers that he was not the owner of any stock. All of these statements were made under oath at a time when the plaintiff thought the papers would be filed.

Then, in her conclusions she stated,

Specifically, the Court concludes from the testimony of the parties that from the outset of the formation of Tune Insurance Center the parties had no definite agreement or decision regarding how ownership by the plaintiff of stock in

the corporation would be handled. Thereafter, the transaction, where 600 shares of stock was pledged to secure a loan and held by Davenport as trustee, similarly demonstrated no clear agreement by the parties regarding the ownership of the 600 shares of stock. That uncertainty was further manifested by the plaintiff's inaction as to the stock when it was released as security. That is, in 1990 when the plaintiff had left his employment with Allstate, was no longer under the constraint of "making waves with Allstate," had commenced employment with Tune Insurance Center, had paid off the note held by Richard Davenport as trustee and the stock was returned to Tune Insurance Center, the plaintiff did not seek transfer of the stock to him. At that critical time, the plaintiff did not act consistent with the theory he has posited with the Court, i.e. that defendant Tune was holding the stock for the plaintiff until the plaintiff left Allstate and was no longer constrained by perceptions of Allstate.

Against this backdrop of uncertainty is the highly significant evidence regarding plaintiff Sharp's inconsistent public representations about the ownership and holding of the stock. On one hand, in 1989, when trying to secure a loan, he represented to two different banks that he owned 1000 shares of stock in Tune Insurance Center which he valued at \$300,000.00. But then, in 1991, when signing bankruptcy documents in which he attested under oath to the veracity of the documents, plaintiff Sharp failed to reveal ownership of the stock or, at a minimum, state that the stock was being held for him by another. Additionally, in documents filed with the IRS in December of 1992, plaintiff Sharp also did not reveal his alleged stock ownership.

It is apparent from the foregoing that at different times plaintiff Sharp made different representations and acted inconsistently about his ownership of stock in Tune Insurance Center. Such inconsistent and varied manifestations by the plaintiff fall well below the high standard of proof required to justify a court imposing a constructive trust based on a parol agreement.

We think these findings and conclusions demonstrate that the chancellor resolved the credibility issue against Mr. Sharp and in favor of Mr. Tune. Without credible testimony by Mr. Sharp that the only thing he had to do was demand his shares from Mr. Tune, he has indeed failed to carry his burden of proof -- whether that is a high standard, or merely a preponderance of the evidence.

The judgment of the court below is affirmed and the cause is remanded to the Chancery Court of Davidson County for any further proceedings that may become necessary. Tax the costs on appeal to the appellant.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

SAMUEL L. LEWIS, JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

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| VS. |) | Davidson Chancery |
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| JOHNNY R. TUNE and TUNE |) | Affirmed |
| INSURANCE CENTER, INC., |) | and |
| |) | Remanded |
| Defendants/Appellees. |) | |

J U D G M E N T

This cause came on to be heard upon the record on appeal from the Chancery Court of Davidson County, briefs and argument of counsel; upon consideration whereof, this Court is of the opinion that in the decree of the Chancellor there is no reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court that the decree is affirmed. The cause is remanded to the Chancery Court of Davidson County for the enforcement of the decree and for the collection of the costs accrued below.

Costs of this appeal are taxed against Robert K. Sharp, Principal, and F. Clay Bailey, Surety, for which execution may issue if necessary.

ENTER _____.

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

SAMUEL L. LEWIS, JUDGE

BEN H. CANTRELL, JUDGE